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Supreme Court, U.S.
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No. 97-557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHRISTOPHER PANGALOS,

Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Respondent submits that *no* question is presented in this Americans with Disabilities Act case. Judgment was entered for Respondent because Petitioner rejected a reasonable accommodation that he himself requested and acknowledged would permit him to perform his job. This basis for summary judgment for Respondent, which Petitioner has failed to point out to this Court, renders irrelevant the burden of proof issue Petitioner relies on in seeking the instant writ of certiorari.

RULE 29.6 STATEMENT

Respondent Prudential Insurance Company of America has no parent company and the following nonwholly owned subsidiaries:

Prudential Mortgage Asset Corporation I
Prudential of America Life Insurance Company
745 Property Investments

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent The Prudential Insurance Company of America ("Prudential" or the "Company") respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on June 30, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. The opinion of the District Court is unpublished, but is available at 1996 WL 612469. The opinions are attached as part of the Appendix to the Petition for Writ of Certiorari at 1a-10a.

JURISDICTION

The Court of Appeals entered its judgment on June 30, 1997. The order of the Court of Appeals denying rehearing was entered on July 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

This Counter Statement of the Case supplements Petitioner's Statement of the Case, which omits and misstates certain important facts.

Mr. Pangalos began his employment with Prudential in 1984 as a sales agent. Sales agents are responsible for marketing and selling a variety of insurance products and for servicing existing clients. These essential functions primarily are performed away from the office in the agent's assigned territory. Mr. Pangalos estimated that ninety percent of his time was spent marketing, selling and servicing insurance products, all of which required work outside an office setting. According to Mr. Pangalos, his position placed him in areas not accessible to restroom facilities over eighty percent of the time.

In September or October of 1993, Mr. Pangalos was diagnosed with ulcerative colitis. This is a chronic condition involving the deterioration of the colon which causes sudden and unpredictable bouts of diarrhea, rectal bleeding and abdominal pain. The condition requires Mr. Pangalos to have almost instantaneous access to toilet facilities. Although he sometimes gets a two or three minute warning of an attack, other times he is forced to have diarrhea in his pants. The only "cure" for this condition is to remove the colon.

After returning from a leave of absence in the fall of 1993, Mr. Pangalos' physician indicated that he could return to work, but needed a bathroom. Efforts to address Mr. Pangalos' needs did not go very far, however, because he was again away from his job and on short-term disability leave beginning in December 1993. At the time he commenced short-term disability leave, Mr. Pangalos told his supervisor, Ari Horowitz, that he was "out sick" and the "doctors have told you I'm not

coming back." Mr. Horowitz did not pursue any further discussions with Mr. Pangalos because he was on disability leave.

Mr. Pangalos remained on short-term disability leave for all of 1994. In April of 1994, Mr. Pangalos purchased a home in Kentucky and moved his family there soon thereafter without notifying Prudential and without requesting a transfer before doing so. In December 1994 and January 1995, Mr. Pangalos was notified that unless he supplied additional medical documentation, he would not qualify for long-term disability benefits and he would be required to return to work.

At that time, Mr. Pangalos discussed with Eve Young, Prudential's Equal Employment representative, his request that Prudential purchase a mobile toilet facility so that he could call on clients. Presumably, when the need arose, he could retreat to his vehicle in order to use those facilities. Mr. Pangalos concluded that some form of mobile toilet facility would allow him to do his job as a sales agent. Mr. Pangalos also requested that Prudential find him another position within the Company, an office position where he could be near a bathroom facility. Mr. Pangalos told Prudential the salary he would be willing to accept and his preference that Prudential open his own sales office for him in Kentucky, where he had moved his family months earlier.

After speaking with Mr. Pangalos, Ms. Young contacted vocational agencies that specialize in solutions to accommodation needs under the Americans with Disabilities Act ("ADA"). Based on the recommendations of these agencies, Prudential offered to purchase and install mobile toilet facilities in Mr. Pangalos' personal vehicle. If Mr. Pangalos' vehicle was not suitable to house such facilities, Prudential offered to reimburse Mr. Pangalos for the costs of a portable toilet. Although such facilities had been requested by Mr. Pangalos because he believed they would permit him to perform his job, he nonetheless told Prudential that this accommodation was unsuitable.

Meanwhile, Prudential was busy seeking other means of accommodating Mr. Pangalos. Although Mr. Pangalos had relocated himself to Kentucky without notice, Prudential

agreed to waive its transfer rules and allow him to seek employment with the Company in the Kentucky area. In addition, Prudential arranged for Mr. Pangalos to interview for a position in Lexington, Kentucky. At the same time, Eve Young mobilized Prudential's Human Resources Department to search for a position. Thereafter, the Human Resources Department contacted numerous field offices in an effort to find Mr. Pangalos a job. Although a few part-time positions were available, Mr. Pangalos' salary requirements made these jobs unacceptable. Further, Ms. Young testified that several positions that were expected to become available were, in fact, never filled because corporate restructuring at Prudential eliminated the need for these positions.

On April 21, 1995, Prudential wrote to Mr. Pangalos and reiterated its offer to provide him with mobile toilet facilities. The letter also informed Mr. Pangalos that he was to contact his supervisor and return to work at the Philadelphia area office no later than May 9, 1995. The letter stated that failure to report to work would result in discharge effective immediately. Mr. Pangalos failed to report to work as directed and was discharged for this reason by letter dated May 10, 1995.

REASONS FOR DENYING THE PETITION

I. The Issue Presented By Petitioner Is Not Raised By The Facts Of This Case.

Petitioner contends that this case presents the question of which party in an ADA action bears the burden of proof on the existence, or non-existence, of a reasonable accommodation, including job reassignment, that would permit the employee to perform the essential functions of his or her job. This issue, however, is not raised in this case because it is uncontroverted that Plaintiff was in fact offered a reasonable accommodation, *viz.* a mobile toilet facility, that he rejected. An employee's rejection of a reasonable accommodation obviates the need to consider the availability of alternative accommodations or who has the burden of locating them. Thus, it is

immaterial whether other types of accommodation, such as reassignment to another position, were available.

An employer fulfills its duties under the ADA when it offers to a qualified individual with a disability a reasonable accommodation that would permit that individual to perform the essential functions of his or her job. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o) (1996). If the employee subsequently rejects the offered accommodation, the employer cannot be held liable under the ADA. 29 C.F.R. § 1630.9(d) (1996) (stating that an employee who rejects an offered accommodation "will not be considered a qualified individual with a disability"); *see also Schmidt v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 342, 344-45 (CA7 1996) (holding that employee who rejects offered accommodation falls outside ADA's protections); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 801 (CA6 1996) (same); *Willett v. State of Kan.*, 942 F. Supp. 1387, 1394 (D. Kan. 1996) (same), *aff'd mem.*, 120 F.3d 272 (CA10 1997); *Pattison v. Meijer, Inc.*, 897 F. Supp. 1002, 1008 (W.D. Mich. 1995) (same); *Marschand v. Norfolk & W. Ry.Co.*, 876 F. Supp. 1528, 1544 (N.D. Ind. 1995) (same), *aff'd*, 81 F.3d 714 (CA7 1996); *Waite v. Blair, Inc.*, 937 F. Supp. 460, 472 (W.D. Pa. 1995) (same).

In the instant case, Prudential, after conferring with Mr. Pangalos, contacted vocational agencies that specialize in solutions to accommodation needs under the ADA. Based on the recommendations of these agencies, Prudential offered to purchase and install mobile toilet facilities for Mr. Pangalos in his personal vehicle. To the extent that Mr. Pangalos was unable to provide a vehicle suitable to house such facilities, Prudential indicated its willingness to reimburse Mr. Pangalos for the costs of a portable toilet.

Mr. Pangalos acknowledged that having a mobile toilet facility would allow him to do his job as a sales agent. Despite this offer of accommodation, Mr. Pangalos persisted in his efforts to secure the accommodation he preferred, namely the establishment of his own Prudential sales office in Kentucky. Frankly, it is not surprising that Mr. Pangalos chose not to pursue further discussions in 1995 about mobile toilet facilities

for his job in Philadelphia when he had already purchased a home and moved his family to Kentucky in the spring of 1994. However, under the ADA, Prudential was under no obligation to provide Mr. Pangalos with his dream accommodation.[1] *See Hankins,* 84 F.3d at 800 (holding that employer was not obliged to comply with migraine-suffering employee's request for transfer to different department where employer had already offered use of paid and unpaid leave time as reasonable accommodation); *see also* 29 C.F.R. § 1630, App. § 1630.9 (1996) ("[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.").

In short, summary judgment was appropriately entered in this case for the simple reason that Mr. Pangalos rejected an accommodation that he himself had requested and acknowledged would permit him to perform his job. This critical fact, noticeably omitted from the instant Petition, renders irrelevant the issue he presents for review, namely which party bears the burden of proof of showing the availability or non-availability of alternative accommodations. That issue need not be addressed once an employee rejects a reasonable accommodation, and, accordingly, the petition for writ of certiorari should be denied.

II. Even If Petitioner's Issue Were Raised In This Case, The Courts Of Appeals Are In Agreement That An ADA Plaintiff Bears The Initial Burden Of Identifying The Proposed Accommodation.

As discussed above, Prudential's offer of a reasonable accommodation obviates the need to consider which party has the burden of showing the existence or non-existence of alternative accommodations. However, even if this issue were raised in the instant action, there is no disagreement among

1. Although it was not required to do so, Prudential did in fact attempt to accommodate Petitioner's desire to work in Kentucky by agreeing to waive its transfer rules and permitting him to interview in Lexington, Kentucky.

the Courts of Appeals that an employee is responsible for first identifying the accommodation, including vacant positions, that he believes would permit him to perform the job.

Only "qualified" individuals with a disability gain the protections of the ADA. 42 U.S.C. § 12112(a). Individuals are "qualified" if they can show that they are able to perform, with or without a reasonable accommodation, the essential functions of the employment position held or desired. 42 U.S.C. § 12111(8). Reasonable accommodation "may include" reassignment to a vacant position. 42 U.S.C. 12111(9).

Following these statutory standards, the Courts of Appeals have consistently and properly concluded that the initial burden is on the plaintiff to establish that he is "qualified" by identifying or describing the desired accommodation. *Willis v. Conopco, Inc.*, 108 F.3d 282, 284-85 (CA11 1997); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (CA9 1996); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1187 (CA6 1996); *Shiring v. Runyon*, 90 F.3d 827, 832 (CA3 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (CA8 1995); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (CA2 1995); *Barth v. Gelb*, 2 F.3d 1180, 1186 (D.C. 1993), *cert. denied*, 511 U.S. 1030 (1994).[2] In those cases where transfer or reassignment is the desired accommodation, the employee must identify vacant positions the essential functions of which he is capable of performing. *Willis*, 108 F.3d at 286; *Shiring*, 90 F.3d at 832.

Petitioner confuses this initial burden of identifying an accommodation with the burden of showing whether or not it is reasonable. The latter issue is where the Courts of Appeals have disagreed. *See Borkowski*, 63 F.3d at 136-39 (discussing differing approaches to which party bears burden of proof on whether proposed accommodation is reasonable). However,

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2. Although some of these cases were decided under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, their analysis applies to claims brought under the ADA. *See Stone v. City of Mt. Vernon*, 118 F.3d 92, 96 (CA2 1996) (holding that requirements for establishing a *prima facie* case are the same under both statutes); 29 U.S.C. § 794(d) (Rehabilitation Act is to be interpreted in accordance with the standards applied under the ADA).

there is no disagreement that it is the plaintiff who must first describe the proposed accommodation, including the identification of vacant positions, if transfer or reassignment is the desired accommodation. Only after this is done will a court consider whether the proposed accommodation is reasonable (and which party bears the burden on this issue).

In the instant case, Plaintiff failed to identify any vacant positions at Prudential that he was capable of performing. The classified advertisements, which Petitioner presented for the first time, after the close of discovery, at oral argument on Prudential's summary judgment motion, do not satisfy this burden for several reasons. First, three of the five advertisements were listed in 1993 and 1994 when Mr. Pangalos was receiving disability payments from Prudential and unable to work. As for the remaining two advertisements, which do not identify any specific position, Mr. Pangalos offered no evidence on the details of what job was being offered and, more importantly, that he was capable of performing it. *See White v. York Int'l Corp.*, 45 F.3d 357, 362 (CA10 1995) (affirming summary judgment where employee failed to show he was suited for any vacant positions). Despite ample opportunity during discovery, Plaintiff simply was unable to point to any suitable vacant position. In sharp contrast, Prudential offered evidence that it actively searched for a position for Mr. Pangalos, even though it was not obligated to do so after it had made its initial offer to provide him with mobile toilet facilities. Unfortunately, its extensive inquiries turned up no positions for him.

The Courts of Appeals are in agreement that this failure by Petitioner to identify a proposed accommodation — in this case a vacant position — renders him not "qualified" and places him outside the ADA's protections. Thus the issue of the proposed accommodation's reasonableness, on which there is some disagreement among the Courts of Appeals, is not raised in this case. Accordingly, there is no need for this Court's review, and the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent The Prudential Insurance Company of America respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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